FAMILY COURT OF NOVA SCOTIA
Citation: Nova Scotia (Community Services) v. R.L., 2012 NSFC 20

Date: December 21, 2012
Docket: FKCFSA-077395
Registry: Kentville

Between:

THE MINISTER OF COMMUNITY SERVICES

Applicant

v.

R.L. & L.S.

v.

T.

Respondents

Judge: The Honourable Judge Marci Lin Melvin

Heard: December 21, 2012

Counsel: Sanaz Gerami, counsel on behalf of the Applicant, the Minister of Community Services
David Baker, counsel on behalf of the respondent, R.L.
Anita Hudak, counsel on behalf of T.L.

CASE SUMMARY

Respondent applied under s.46 of the ***Children & Family Services Act***, for a review of the temporary care order on the grounds that an important best interests issue had been overlooked by the Minister of Community Services. Her two teenage children were in the care of the Minister of Community Services, living in group homes, but becoming increasingly involved in destructive behavior and criminal activity. She said a group home wasn't a secure facility and her children needed a secure facility. The Court found that the Minister of Community Services had overlooked an important best interests issue and ordered the Minister of Community Services to re-evaluate it's decision and plan, taking into account the overlooked factors as was in the best interests of these children, including placing these children in a permanent secure facility.

By the Court:

SUMMARY OF FACTS

[1] This is an application pursuant to the ***Children & Family Services Act***, **R.S.N.S., 1990, chapter 5, section 46(1)**, made by the Respondent mother, R.L., to review the order for temporary care and custody.

[2] The Protection application and supporting Affidavit with respect to the four children of the respondent mother, dated September 22, 2011, resulted in a finding by consent, that there were reasonable and probable grounds to believe that the children were in need of protective services at the 5 - day stage, the 30 - day stage, and further by the consent of the respondent mother, that the children were in need of protective services, at the protection stage. The father, L.S., was not involved at any stage in the proceedings. One child, D., during this time was in the care of the Minister of Community Services, while the other three children were in the care of the respondent mother, under the supervision of the Minister. The placement of

these children continued under the terms of the disposition order, which was granted on the consent of the parties on February 29th, 2012.

[3] The four children are T., D., R., and M.

[4] On March 19, 2012, the date of the first review order, the child, T., was placed in the care of the Minister of Community Services, while the younger children, R. and M., remained in the care of the respondent mother, until the date of the third review order which placed the children R. and M., with the Minister.

[5] The fourth review order placed the children, R. and M., back with the respondent mother on August 15, 2012.

[6] On November 8, 2012, at the fifth review, the Minister of Community Services sought a continuation of the order. At that time the Respondent mother voiced her concerns that the Minister's **plan of care**, (that the children D. & T. reside in a group home), was not effective and not in her children's best interests. The respondent mother decided to make an application pursuant to the ***Children &***

Family Services Act, **supra., sec. 46(1)** for a review of the order for temporary care.

[7] An Affidavit was filed by the respondent mother, in support of her application that D. and T. be moved from the foster home they were in (a group home) to a permanent secure residence. Both children had spent time at a secure facility in the province, but the mandate of this particular facility is to keep the child for 30 days, in most instances, and then the child is returned to their regular foster-care setting.

[8] The respondent mother wanted the Minister to place the children outside of Nova Scotia as there is no type of permanent secure facility within Nova Scotia.

[9] At the time of the hearing, both D. and T. were at the secure facility for 30 day stays, and T. was due to be released to go back to his group home on December 24th, 2012.

[10] Both D. and T. have had numerous incidents of running away from their respective group homes, Applications for Locate & Detain Orders, involving

themselves in drug use, and criminal activity, and not availing themselves of the services offered by the Minister of Community Services, prompting the respondent mother's application to review the Minister's plan of care, and seeking a variation.

[11] T. has party status and was represented by Ms. Hudak. D. has non-party status and his views were made known to the court by the same counsel. Ms. Hudak advised the Court that neither of the children wished to be present in court for the hearing. She also advised that neither of the children wanted to leave Nova Scotia.

[12] Counsel filed briefs and matter was heard on December 20, 2012.

ISSUES

[13] 1. Does the jurisdiction of the court extend to the administrative functions afforded to the Minister of Community Services under the ***Children & Family Services Act*** **,** supra., and subsequent regulations?

2. When the province has a child in care, does the court have jurisdiction to review and monitor the province's judgement and decisions about the care the child is to receive and the programs to be delivered?

3. Has an important best interests issue been overlooked by the Minister?

4. Has the Respondent, R.'s application under section 46 of the ***Children & Family Services Act,*** supra., been made out?

ANALYSIS

1. Does the jurisdiction of the court extend to the administrative functions afforded to the Minister of Community Services under the *Children & Family Services Act,* supra., and subsequent regulations?

[14] Counsel for the Minister of Community Services argues that the Court lacks the jurisdiction to order the Minister of Community Services to provide or avoid a particular place of residence for a child in care.

[15] She further argues the ***Children and Family Services Act,*** supra., empowers the Governor in Council to make regulations respecting procedures and conditions

for admission to a child-caring facility, and that there is no provision for the Court to take any role in placement decisions.

[16] In **Ross Barrett & Scott v. A.S. (Guardian ad litem of), [1995] N.S.J., No. 59 (CA)**, at paragraph 19, the Court held:

> **...It is not the function of the Court to pass judgement upon the wisdom of the Governor in Council in making these Regulations so long as it has acted within the bounds of the authority delegated to it by the Legislature.**

[17] Counsel for the Minister of Community Services argues:

> **The Minister of Community Services respectfully submits that the Legislature has granted to the Agency the power to select the child-caring facility most likely to meet the child's needs and best interests. Such facilities are operated or "approved or licensed" and supervised entirely by the Minister of Community Services and not by any Court, under the scheme of the Act. The Governor in Council has created, as permitted by the Legislature (Section 99(1), an entirely administrative and non-judicial procedure for making placement decisions respecting children in care.**

[18] David Baker, counsel for the respondent mother, argues that his client:

> **...takes no exception with the general principles articulated by the Minister that, in our constitutional government, the executive branch --- which is integrated with the legislative branch --- retains certain prerogatives and discretionary authority fulfilling its statutory duties, which are ordinarily beyond interference by the Judiciary.**

[19] This Court has considered the case of **Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817,** at paragraph 53**,** wherein the Court states**:**

> **...[D]iscretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by statute, but ... considerable deference will be given to decision-makers by the court in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature...**

[20] Further, in the case of **College Housing Co-operative Ltd. v Baxter Student Housing Ltd., [1976] 2 S.C.R. 475,** at page 480, the Court holds:

> **Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case. And further, in my opinion, the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of**

> **legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.**

[21] The Jurisprudence as noted above does not involve children, and in all matters involving children, the most important consideration is what is in a child's best interests.

2**. When the province has a child in care, can the Court review and monitor the province's judgment and decisions about the care the child is to receive and the programs to be delivered?**

[22] In **Syl Apps Secure Treatment Centre v. B.D. [2007] 3 S.C.R. 83, 284 D.L.R. (4th) 682, at paragraph 64**, Abella, J., holds:

> **Child protection work is difficult, painful and complex. Catering to a child's best interests in this context means catering to a vulnerable group at its most vulnerable. Those who do it, do so knowing that protecting the child's interests often means doing so at the expense of the rest of the family. Yet their statutory mandate is to treat the child's interests as paramount. They must be free to execute this mandate to the fullest extent possible. The result they seek is to restore the child, not the family. Where the duties to the child have been performed in accordance with the statute, there is no ancillary duty to accommodate the family's wish for a different result, a different result perhaps even the child protection worker has hoped for.**

[23] In **Nova Scotia (Community Services) v. C.C., 2010 NSSC 129,** supra., **(NSSC-Family Division), MacDonald, J.**, holds, at paragraph 18:

> **The principles applied by the Supreme Court of Canada in a case known as Nova Scotia Minister of Health v. J.J. are applicable, and they confirm that when the province has a child in care the court is required to review and monitor the province's judgment and decisions about the care the child is to receive and the programs to be delivered. The issue before me is what is the scope of that court review.**
>
> **...The *Children and Family Services Act* requires all actions and decisions taken pursuant to its provisions to be examined through the prism of what is in the child's best interest. ...However, courts have been directed to recognize that the Legislature has given the Minister the authority to devise plans and those decisions, as incorporated in the Minister's plans of care, are to be given great respect and careful review. This court is not authorized, nor can it be, to substitute its own plan of care. That is an administrative function....**
>
> **This court can decide, within those parameters that an important best interests issue has been overlooked by the Minister and, therefore, request the Minister to reevaluate its decision and plan taking into account that overlooked factor or factors. As a result, I've decided that my jurisdiction is to determine whether there is a best interest factor in respect to (the adolescent) that has been overlooked by the Minister in developing its plan for him.**

3. **Has an important best interests issue been overlooked by the Minister**?

[24] The behavioral problems of the children D. & T. were testified to by Sarah Troop, an employee of the Minister of Community Services, and case manager for T. and D.

[25] This is a compilation of Ms. Troop's testimony: these children have been smoking marijuana since they were 7 years old; who have experimented with cocaine (T.); who don't understand the harmfulness of their actions; who have charges pending in youth court; who have convictions; who has suicidal ideations because two of his friends purportedly hung themselves in the group home in which he was living (D.); who runs away daily from his group home (D.); who has a pending charge for assault causing bodily harm (D.); who does not go to school (T.); who runs away for extensive periods of time (T.); who has been at the secure facility for 30 day increments, four times since September of 2011 (D.); and two times since March 2012 (T.); who are very intelligent and know already how to act to get out of the secure facility at the end of the 30 days; who have been remanded to Waterville since coming into care, and she states in her evidence: "...and we are working to stabilize the boys."

[26] What is of tremendous concern to the Court is the premise that something unthinkable has to happen before the Minister of Community Services will consider alternatives for these children.

[27] Ms. Troop was certainly articulate, and apparently very knowledgeable with respect to T. and D. (stating she speaks with them almost daily) and the Court was impressed with her candour. Ms. Troop testified that she "hoped, she really hoped", that the children had made some improvements this time. As argued by Mr. Baker for the respondent mother, "...hope is indeed something to which one must aspire, but perhaps not terribly realistic in these circumstances".

[28] The respondent mother, testified: "I don't believe it is in their best interests at this time to be in a group home, to come and go as they please." She testified that she had been having so many difficulties with these children and the agency became involved with her perseverance. She sought their help because of her children's behaviours. But she says the way they are acting now, they may as well be at home. "I signed them into care. I said: 'help me please.'" Ms. Troop testified that she was not aware of any other secure treatment facility in Nova Scotia that would meet the needs of these children. Indeed, the evidence before

the Court is that the 30 day secure treatment centre, is the only secure treatment centre in Nova Scotia.

[29] The respondent mother testified: “They are continuing to engage in criminal matters and it is hurting them and their futures. I’m their mom and I think it’s best they were in a supervised facility.”

[30] As of December 24th, 2012, T. will be released from the secure facility, and returned to his group home. As of January 11th, 2013 (approximately) D. will be released from the secure facility to his group home. This is where the Court finds there to be a major flaw in the agency’s plan. This is where the Court finds that a best interests issue has been overlooked. Counsel for the respondent mother noted that ...“there ought to be some common sense, some caution before these children are released from the [secure facility] ...back into the community.”

[31] The Court has to give serious consideration, therefore, to whether the Minister’s plan of care is serving the best interests of these children or indeed a best interests issue has been overlooked by the Minister.

[32] In **Re: J.(J.) 2005 SCC 12,** at paragraphs 21 and 24, Justice Abella, delivering the decision of the Supreme Court of Canada holds:

> **To meaningfully fulfil its statutory duty to measure the proposed services against the best interests standard, the court's jurisdiction must of necessity include the ability to amend proposals suggested by the Minister. That in turn means that in putting the Minister's plan on one scale and the adult's welfare on the other, the court must be able to attach reasonable terms and conditions to the Minister's suggestions (see Nova Scotia (Minister of Community Services) v. K. (L.), [1991], 107 N.S.R. (2d) 377 (N.S. Fam.Ct.) at paras. 62 and 63, per Daley J.F.C.). It makes no sense to give a court jurisdiction to assess the Minister's plan without including in that authority the ability to refine the government's intervention to ensure legislative compliance....**
>
> **In assessing the terms and conditions it considers most conducive to the adult's welfare under s. 12 and best interests under s. 9(3)(c), the court is of course obliged to consider the availability of services and the Minister's capacity to provide them. However, having made the decision to take responsibility for the adult, the state is obliged to develop a plan in that adult's best interests.**

[33] Are these comments applicable to matters under the ***Children & Family Services Act***, supra.?

[34] The purpose of the ***Children and Family Services Act,*** supra., is set out in the preamble to the Act. It is "...to protect children from harm, promote the integrity of the family, and assure the best interests of the children..."

[35] Section 2 of the Act sets out: "In all proceedings and matters pursuant to the **Act**, the paramount consideration is the best interests of the child."

[36] **In Family and Children's Services of Yarmouth County v. R.C., 2006 NSFC 2 (CanLII), Comeau, CJ** (as he then was) **at paragraph 42** states:

> **The Court has the duty to look at all plans of care proposed, including the Agency plan. It is not bound to accept one plan or other in its entirety. The Court can order its own plan that may be original or a combination of proposed plans, always taking into consideration Section 2 of the *Children & Family Services Act.***
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> **[43] Authority for this proposition is found in the Supreme Court of Canada's decision in Nova Scotia (Minister of Health) v. J.J., 2005 SCC 12 (Can LII), [2005] 1 S.C.R. 177, 205 S.C.C. 12 which deals with the Nova Scotia Adult Protection Act. It is an act that can be considered parallel to the Children and Family Service Act, in that it is dealing with those former children all grown up, who are over the age of sixteen (see C.3(a) of the Adult Protection Act), and unable to protect themselves. The CFS Act provides for protection of children to age sixteen.**
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> **[44] Comeau, C.J., goes on to quote from J.J., supra., at page 10 of Abella, J's, decision:**
>
> **While it is true that the Minister, and not the Family Court, is responsible for developing plans for a vulnerable adult, this does not mean that the Minister can unilaterally dictate the nature of the services or placement. The Act assigns to the Court the responsibility to authorize only**

> **those services that are in the best interests of the adult because they 'will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect.' It is inherent in that obligation that the Court be able to assess whether those proposed services comply with the requirements in s. 9(3)(c). This in turn requires the Court to be able to indicate to the Minister what aspect of the plan the Court, as the statutorily designated guardian of the adult's welfare, finds acceptable or unacceptable based on whether it meets the statutory test.**

[37] Comeau, C.J., states at paragraph 49:

> **This decision is applicable to the *Children and Family Services Act* in a manner that, in effect, could see the substitution of the word "adult" for that of "child" because the two acts are so similar in their intent. One is an extension of the other from child to adult protection. The Court's ability under Section 42(1) CFS Act to craft its own plan of care in the best interest of the child is a jurisdiction rooted in its role as a "gate keeper to state intervention.**

4. **Has the Respondent mother's application under section 46 of the *Children & Family Services Act*, supra., been made out?**

[38] Section 46 of the ***Children & Family Services Act***, supra., states:

> **46(1) A party may at any time apply for review of a supervision order or an order for temporary care and custody, but in any event the agency shall apply to the court for review prior to the expiry of the order or where the child is taking into care while under a supervision order...**

> **(4) Before making an order pursuant to subsection (5), the Court shall consider:**
>
> > **(a) whether the circumstances have changed since the previous disposition order was made;**
> >
> > **(b) whether the plan for the child's care that the Court applied in its decision,**
> > **is being carried out;**
> >
> > **(c) what is the least intrusive alternative that is in the child's best interests; and**
> >
> > **(d) whether the requirements of subsection (6) have been met.**

[39] In considering section 46, particularly section 46(4), the court finds the plan for the children's care that the Court applied in it's decision is not being carried out: the children are not remaining in their respective group homes, and the children are - most of the time - refusing to engage in services, and involving themselves in behaviors that cannot ever be considered in their best interests.

CONCLUSIONS:

[40] The Court has considered all of the evidence and the arguments of the parties.

[41] When the province has a child in care, the Court is required to review and monitor the province's judgement and decisions about the care the child is to receive and the programs to be delivered. As stated in JJ, supra, by the Supreme Court of Canada:

> **It makes no sense to give a Court the jurisdiction to assess the Minister's plan without including in that the authority, the ability to refine the government's intervention to ensure legislative compliance.**

[42] The Court can review the effectiveness of the Plan of Care through the prism of the best interests of the children. I have independently evaluated what is in the children's best interests and not considered this Court to be bound by what the Minister of Community Services or the family or the children believe to be in their best interest. Again, in JJ, supra, the Court states:

> **While it is true that the Minister, and not the Family Court, is responsible for developing plans for a vulnerable adult, this does not mean that the Minister can unilaterally dictate the nature of the services or placement. The Act assigns to the Court, the responsibility to authorize only those services that are in the best interests of the adult because they 'will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect.**

[43] And as noted by Comeau, C.J., in **Family & Children's Services of Yarmouth Court**, supra., the word "child" can be substituted for the word "adult" as the acts are so similar in intent.

[44] The Court is the gatekeeper of the plan. Therefore, upon reviewing the Minister of Community Services's plan of care in this matter, the Court finds that the sum of Minister of Community Services's judgments and decisions (as voiced through Ms. Troop) about these children in care are not working for these children. These children must be kept safe and must have services to help them grow in a positive direction. The Court finds that in order to ensure legislative compliance that the best interests of these children are met, the Minister of Community Services must re-evaluate it's plan of care, with serious consideration to keeping these children in a secure facility.

[45] The best interests of the children trump everything else. If there isn't a facility in the province that can keep these children safe and help them find a path towards becoming a responsible law-abiding adults with respect for their own lives, and those of others, then the Minister has to seriously consider looking

elsewhere. For these children to live in group homes and indulge in the lifestyle as in evidence before the Court cannot be considered to be in their best interests. As stated by Justice Abella in the Supreme Court of Canada case of **Syl Apps Secure Treatment Centre** v. **BD**, supra., the Minister's statutory mandate to treat the child's best interest is paramount. The best interests of the children are what the Court must focus it's primary and perhaps only attention on. As noted by **MacDonald, J., in Nova Scotia (Community Services)** v **C.C**., supra.,

> **This Court can decide, within those parameters that an important best interests issue has been overlooked by the Minister and, therefore, request the Minister to reevaluate its decision and plan taking into account that overlooked factor or factors.**

[46] In evaluating and weighing all of the evidence before the Court, this Court finds that an important best interests issue has been overlooked by the Minister, and requests the Minister of Community Services re-evaluate its decision and plan, taking into account the overlooked factors noted that would be in these children's best interests.

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Marci Lin Melvin

Judge of the Family Court

For the Province of Nova Scotia